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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1998

ELIZABETH TAYLOR GRADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KYLE O'DOWD
General Counsel
Families Against
Mandatory Minimums
1612 K. Street, N.W.
Washington, D.C. 20006
(202) 822-6700
Of Counsel

DOUGLAS W. DUNHAM*
ELLEN P. QUACKENBOS
MARK S. CHEFFO
MATTHEW I. COHEN
919 Third Avenue
New York, New York 10022
(212) 735-3000
**Counsel of Record*

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in ruling that an anonymous, undated note, found in petitioner's home, is admissible as an adopted statement under Federal Rule of Evidence 801(d)(2)(B), in the absence of any evidence establishing that the petitioner acted upon the note -- a ruling that is in direct conflict with decisions by the Ninth, Tenth, and First Circuits.

2. Whether the Fourth Circuit erred in ruling that an otherwise inadmissible anonymous hearsay note is admissible as circumstantial evidence of an alleged conspiracy, where the note was admitted to prove the truth of the matter asserted therein, and no limiting instruction was given to the jury -- a ruling that is in direct conflict with the Tenth Circuit's decision in *United States v. Jefferson*, 925 F.2d 1242 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991).

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, Elizabeth Taylor Grady ("Mrs. Grady" or "Petitioner"), is an individual and, as such, has no corporate relationship. Mrs. Grady was a defendant in the underlying action in the United States District Court for the Middle District of North Carolina and defendant-appellant before the United States Court of Appeals for the Fourth Circuit.

Two other defendants, Robert Allen Merritt and Thomas Elmore Harris, were also parties to the proceedings before the District Court and before the Fourth Circuit.

Respondent is the United States of America ("Respondent" or "the Government"). Respondent was the plaintiff in the underlying action before the United States District Court for the Middle District of North Carolina and the plaintiff-appellee before the United States Court of Appeals for the Fourth Circuit.

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Petitioner Elizabeth Grady respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

There is no written opinion of the United States District Court. The portion of the trial transcript containing the district court's evidentiary ruling that is the subject of this petition for certiorari is included herein as Appendix A. The Fourth Circuit's unpublished, *per curiam* opinion is included herein as Appendix B and is available online at 1998 U.S. App. LEXIS 7807.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 801(d)(2)(B) states:

Rule 801(d) Statements which are not hearsay. A statement is not hearsay if –

(2) The statement is offered against a party and is . . .

(B) a statement of which the party has manifested an adoption or belief in its truth . . .

Fed. R. Evid. 801(d)(2)(b).

STATEMENT OF THE CASE

The Fourth Circuit's decision in this case is in direct conflict with decisions by other Courts of Appeals regarding (i) the standard for the admissibility of adopted statements under Federal Rule of Evidence 801(d)(2)(B) and (ii) the proper standard for the admissibility of hearsay evidence for "circumstantial" purposes. In this case, the Fourth Circuit affirmed the admission of an unsigned, undated note purportedly addressed

to petitioner, based solely on the note's having been found in Mrs. Grady's house -- a ruling that conflicts with the express requirement in the Ninth, Tenth, and First Circuits that the defendant have acted upon such a note or writing, *i.e.*, that there be "possession plus." This note was a critical piece of the evidence upon which Mrs. Grady was convicted.

Mrs. Grady is a fifty-six year old grandmother in frail health. She had no prior crimminal record. She was convicted along with her son, who lived with her, and another co-defendant, of conspiracy to possess and possession of cocaine base with intent to distribute. Mrs. Grady worked for 19 years as a housekeeper in the home of Judith Dingfelder, who testified at trial on petitioner's behalf, and as a cook at the University of North Carolina.[1]

At trial, the government presented as evidence an undated, unsigned note, scrawled on the back of an envelope. An investigator with the Carrboro, North Carolina, Police Department, testified that he found the note during a search of the residence in which petitioner and her son resided. The note read as follows:

> Lit, I have paid Lucille rent and turned her heat on. I am going to the motel for one more night and get some rest by myself, so give me five rocks and $20.00 and we will . . . add it up tomorrow.

(App. 14a)

The note was found with a "large quantity" of other papers in a dresser drawer in a bedroom in petitioner's house.

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1 Trial Transcript, 10/19/95, at 3-47 to 3-57, *United States v. Grady, Merritt, Harris*, Nos. 1:95CR213-1, 1:95CR213-2, 1:95CR213-3 ("Tr.").

(Tr. 10/18/95, at 2-45) The investigator testified that the papers found in the drawer with the note had the names of various people on them, including petitioner, her daughter Diane Robinson, Tracy Sheryl Robinson, Dorothy Farmer Wilson, William Scurlock, and others. (Tr.10/18/95, at 2-56, 2-58, 2-81, 2-82)

No evidence was presented to show that petitioner ever acted upon the note or even saw or read the note. No evidence was presented to show when the note was written or by whom. The writer of the note was not identified and did not testify.

Over the objections of petitioner's counsel, the district court ruled that the note was admissible because it was found in the "possession" of Mrs. Grady. The district court stated that "[i]t can be hearsay; but if it's in possession of your client, then that is not hearsay." (App. 9a) The district court did not specify the rule of evidence under which the note was admitted. Because the note was admitted for the truth of the matter asserted, the trial court did not instruct the jury to consider the note only for circumstantial or other limited purposes.[2]

During the trial, a "blow-up" copy of the note was displayed in front of the jury. (App. 1a) The Government, during its case in chief, presented the note to the jury as direct evidence of petitioner's guilt. The prosecutor stated to the jury during his closing argument in reference to the note: "And, finally, . . . on this letter put on the chart, addressed to 'Lit,' 'So give me five rocks,' you don't ask somebody to give you something unless they have it, ladies and gentlemen." (Tr. 10/19/95, 1-43).

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2 In addition, the district court instructed the jury that if it determined that Mrs. Grady's possession of the note was an act in furtherance of the conspiracy, it could be considered as evidence against her co-defendants as well. (Tr. 10/18/95, at 2-73 to 2-75)

The petitioner was convicted under 21 U.S.C. §846 and §841 of conspiracy to possess and possession of cocaine base with intent to distribute. (App. 11a)

The Fourth Circuit affirmed petitioner's conviction in an unpublished, *per curiam* decision. The Fourth Circuit determined that the anonymous, undated note was admissible as an adoptive admission under Federal Rule of Evidence 801(d)(2)(B), stating, "'possession of a written statement becomes an adoption of its contents.'" (App. 13a (quoting *United States v. Marino*, 658 F.2d 1120, 1124 (6th Cir. 1981)). In so ruling, the Fourth Circuit did not address the undisputed fact that there was no evidence that Mrs. Grady had acted upon the note.

The Fourth Circuit alternatively ruled that the note was admissible, "not to prove the truth of the matter asserted, but to show the circumstantial relationship of the parties to the scene, the contraband or other parties." (App. 13a) The Fourth Circuit did not address the fact that the district court admitted the note for the truth of the matter asserted, without instructions limiting the jury's consideration of the note to circumstantial or background purposes. The Fourth Circuit also ignored the fact that the note was undated and had not been shown to have any temporal connection to the conspiracy charged.

Mrs. Grady is presently serving a term of imprisonment of 80 months. Since her incarceration, Mrs. Grady has suffered strokes and other serious health problems.

REASONS FOR GRANTING THE WRIT

This case presents two important issues under the Federal Rules of Evidence that are the subject of conflicting rulings in the Courts of Appeals. First, the Fourth Circuit's decision in this case directly conflicts with decisions of three other Courts of Appeals regarding the proper standard for the admission of a writing under Federal Rule of Evidence

801(d)(2)(B), which defines as non-hearsay "a statement of which the party has manifested an adoption or belief in its truth." In the present case, the Fourth Circuit ruled that an unsigned, undated note addressed to petitioner was admissible as an adoptive statement, even though it was undisputed that there was no evidence that petitioner acted upon the note. (App. 2a - 4a; App. 14a) Contrary to the ruling of the Fourth Circuit in this case and the Sixth Circuit in *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981), the Ninth, Tenth and First Circuits have ruled that mere possession of a writing does not constitute an adoption of the statements contained therein. These courts have required a showing that the defendant in some way "acted upon" the writing in question or, in the words of the First Circuit, that there be "possession plus." *See United States v. Carrillo*, 16 F.3d 1046, 1048-49 (9th Cir. 1994); *United States v. Ospina*, 739 F.2d 448, 450 (9th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985); *United States v. Ordonez*, 737 F.2d 793, 799-801 (9th Cir. 1983); *United States v. Jefferson*, 925 F.2d 1242, 1253 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991); *United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994). This conflict between the Courts of Appeals as to the proper standard for determining the admissibility of a writing as an adopted statement implicates the fundamental purposes of the hearsay rules and merits resolution by this Court.

The Fourth Circuit also ruled as an alternative ground that the anonymous note was admissible as "background" or circumstantial evidence, despite the fact that the note was admitted by the district court for the truth of the matter asserted therein and was presented to the jury, without limiting instruction, as direct evidence of Mrs. Grady's guilt. This alternate ruling put forward by the Fourth Circuit for admission of the anonymous note raises important evidentiary issues that are the subject of conflicting rulings in the Courts of Appeals. In a

ruling that is directly contrary to the Fourth Circuit's decision in this case, the Tenth Circuit has expressly refused to allow hearsay evidence of the kind admitted here to be changed into nonhearsay "simply by calling it 'circumstantial evidence.'" *Jefferson*, 925 F.2d at 1253 n.12 (citation omitted). As the Tenth Circuit held, where (as here) evidence is admitted for truth, "the fact that the evidence was introduced to link circumstantially the accused to the crime does not render the hearsay violation any more acceptable." *Jefferson*, 925 F.2d at 1253.

The admission at trial in the present case of the anonymous, undated note was not only improper under the Federal Rules of Evidence, but also violated Mrs. Grady's fundamental rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Because the author of the note was not identified, petitioner was unable to cross-examine him or her at trial, as required by the Confrontation Clause. Therefore, the erroneous admission of the unsigned, undated note was reversible error, because it clearly was not harmless beyond a reasonable doubt. *See Idaho v. Wright*, 497 U.S. 805, 827 (1990).

Petitioner respectfully submits that this Court should grant certiorari to resolve the important conflicts among the Courts of Appeals as to (i) the proper standard for the admission of evidence as an adoptive statement under Federal Rule of Evidence 801(d)(2)(B) and (ii) the correct standard for the admission of otherwise inadmissible hearsay as "background" or "circumstantial" evidence.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS AS TO THE PROPER STANDARD FOR ADMISSION INTO EVIDENCE OF A WRITING AS AN ADOPTIVE STATEMENT

Federal Rule of Evidence 801(d)(2)(B) removes a statement from the scope of the hearsay exclusion if the party against whom the statement is offered "has manifested an adoption or belief in its truth." In the instant case, the Fourth Circuit ruled that an undated, unsigned note was admissible under Rule 801(d)(2)(B) as an adopted statement by the petitioner, even though there was no evidence that she acted upon the note, or indeed that she ever saw or read the note. This decision directly conflicts with decisions by the Ninth, Tenth, and First Circuits.

In contrast to the Fourth Circuit, the Ninth Circuit, in determining the admissibility of a writing as an adoptive statement, follows a long-standing rule that explicitly requires both that (i) the writing was in the possession of the defendant and that (ii) the defendant was shown by the evidence to have *acted upon* the information contained in the writing. *See United States v. Carrillo*, 16 F.3d 1046 (9th Cir. 1994); *United States v. Ospina*, 739 F.2d 448, 450 (9th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985), *United States v. Ordonez*, 737 F.2d 793, 799-801 (9th Cir. 1983); *Poy Coon Tom v. United States*, 7 F.2d 109, 110-11 (9th Cir. 1925); *see also* Michael Graham, *Handbook of Federal Evidence* § 801.21, at 307-10 (4th ed. 1996) ("Mere possession of a document standing alone does not constitute a manifestation of adoption or belief in its truth.").

In *Ordonez*, 737 F.2d 793 (9th Cir. 1983), for example, the Ninth Circuit held that ledgers found in a residence leased

by one of the defendants were inadmissible as adoptive statements. The Ninth Circuit in *Ordonez* rejected the "bold proposition" that "the possession of a document standing alone, is an adoption of its contents." *Ordonez*, 737 F.2d at 799-800. In the absence of any finding by the district court that the defendants had "manifested their adoption of the statements in the ledgers or that they had demonstrated their belief in their truth" and in the absence of "any evidence in th[e] record that would support such an inference," the Ninth Circuit ruled that the ledgers were not admissible as adoptive statements. *Id.* at 801.

In its decision in *Ordonez*, the Ninth Circuit looked to its earlier decision in *Poy Coon Tom v. United States*, stating:

> The law of this circuit concerning the admissibility of a document found in the possession of the defendant, for the truth of the matter asserted, is set forth in *Poy Coon Tom v. United States*, 7 F.2d 109 (9th Cir. 1925). In *Poy Coon Tom*, the Government offered an unsigned letter from a third person found in the defendant's possession which discussed a proposed narcotics transaction. The Government offered the letter "to show that the plaintiff in error was a known trafficker in narcotics, and that he had not only sold narcotics to the informer in question, but to others as well." We concluded in *Poy Coon Tom* that the admission of the letter was prejudicial error.

Ordonez, 737 F.2d at 800. The Ninth Circuit in *Ordonez* quoted the explanation in *Poy Coon Tom* for requiring a showing of action by the defendant upon the writing sought to admitted as an adoptive statement:

> We do not understand upon what principle the letter was admitted or was competent. It was manifestly not admissible as the unsworn declaration or statement of the unknown writer, and it was equally inadmissible for the purpose of showing an admission or an implied admission on the part of the plaintiff in error, in the absence of proof tending to show that the letter was answered or otherwise acted upon.
>
> "The fact that an unanswered letter or other paper is found in the custody of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him. Were it admitted, an innocent man might by the artifice of others, be charged with a prima facie case of guilt, which he might find it difficult to repel."

Poy Coon Tom, 7 F.2d at 110 (citation omitted) (quoted in *Ordonez*, 737 F.2d at 800).

Indeed, in marked contrast to the Fourth Circuit in the present case, the Ninth Circuit has upheld the admission of anonymous writings as adoptive statements *only* where there is competent evidence that the writings were acted upon by the defendant. For example, in *Ospina*, the Ninth Circuit ruled that business cards containing handwritten notations and found on a dresser in the defendant's motel room could be introduced into evidence precisely because the defendant had been shown to have acted upon them. *See Ospina*, 739 F.2d at 451. One of the business cards bore the phone number of the hotel where the other defendants were staying. The other card contained the address of the location where the cocaine involved in *Ospina* had been transferred. *See id.* The Ninth Circuit found adoption because the cards "were in the possession of" the

defendant and the defendant "acted on the information written on the cards when he travelled to the address written there to pick up the cocaine." *Id.*; *see also Carrillo*, 16 F.3d at 1049 (explaining *Ospina*).

Similarly, in *Carrillo*, the Ninth Circuit determined that a small folded white piece of paper with notations that was found in the pocket of one of the defendants was admissible because it had been acted upon. *See id.* at 1048. The paper, which was neither signed nor dated, contained three columns of numbers and letters. *See Carrillo*, 16 F.3d at 1048. The figures written on the paper coincided in both amounts and prices with the negotiations that were conducted by the defendant with a Government informant and recorded on videotape or audiotape. The Ninth Circuit concluded that the paper was admissible as an adoptive statement because "there was evidence of adoption that went beyond mere possession." *Id.* at 1049. The Ninth Circuit reasoned that because the "figures written on the paper coincided with [the defendant's] negotiations," there was "a sufficient link between the writing and [the defendant's] actions to permit the district court to find an adoption within the meaning of *Ospina*." *Id.*

The law of the Tenth Circuit is also directly contrary to the Fourth Circuit's decision in this case. In *Jefferson*, the Tenth Circuit explicitly rejected the rule that possession equals adoption that was articulated by the Sixth Circuit in *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981), and followed by the Fourth Circuit in the instant case. The Tenth Circuit explained:

> We are aware of the approach taken by the Sixth Circuit in *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981), where it held that an airline ticket used at trial to prove that "the defendants traveled in interstate commerce

> . . . was admissible because the defendants' possession of the documents constituted an adoption." The court stated: "Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written statement becomes an adoption of its contents." We decline to apply the approach taken by the Sixth Circuit in *Marino* to this case. We can think of too many cases where the mere possession of a bill in no way constitutes an adoption of its contents.

Jefferson, 925 F.2d at 1253 n.13.

Furthermore, the First Circuit has required more than mere possession for a writing to be admissible as an adoptive statement. In *United States v. Paulino*, the First Circuit specifically followed the Ninth Circuit in determining that "the correct approach, exemplified by [the Ninth Circuit's decision in] *Ospina*, is that 'possession plus' can evidence adoption." *Paulino*, 13 F.3d at 24.

Under the rule that prevails in the Ninth, Tenth, and First Circuits, the anonymous note in this case clearly would not have been admissible as an adoptive statement. There was no evidence of any kind (as required by the Ninth, Tenth and First Circuits) that Mrs. Grady acted upon the note or otherwise manifested adoption of it. Indeed, there was no evidence that Mrs. Grady even read or saw the note, which was scribbled on the back of an envelope and stuffed in a drawer with numerous other papers bearing the names of various persons, including her daughter Diane and several other persons.

The Fourth Circuit's ruling that Mrs. Grady had adopted the note was based simply on the note's being addressed to Mrs. Grady and found in the drawer in her home. (App. 14a). While the Fourth Circuit also points to the contents of the note as

"consistent with other evidence"[3] in the case, the Fourth Circuit does not (and cannot) point to any evidence in the record of any action taken upon the note by Mrs. Grady (or by anybody else) or of any actual connection between the contents of the note and the transactions with which the defendants were charged. The reality is that, under the Fourth Circuit's standard, most people would be deemed to have adopted many statements with which they do not agree. Under that standard, any time a note or letter addressed to a person was found in that person's home or otherwise held to be in that person's "possession," that person would be deemed bound by the contents of the note or letter, even where (as in the case of Mrs. Grady) no proof exists that the person ever read or saw -- much less acted upon -- the note or letter. Such "possession" of a note or letter simply does not indicate adoption of or belief in its contents. *Cf. Leach & Co. v. Peirson*, 275 U.S. 120, 128 (1927) (Holmes, J.) ("A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts.").

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3 As discussed below, the "consistency" that the Fourth Circuit finds with the other evidence in this case is specious. The note is not dated and nothing in the record indicates that it was written during the time of the conspiracy charged in this case. If the purported "consistency" between the note and the other evidence were a basis for admitting a writing as an adoptive statement, the writings in *Poy Coon Tom* and *Ordonez* would have been admitted. Indeed, in nearly every case, the writing sought to be introduced as an adoptive statement will be "consistent" with other evidence. In the present circumstances, the Fourth Circuit's ruling effectively removes not only the protections of the hearsay rule, but also the protections of Rule 404, prohibiting evidence of "other crimes" except for limited purposes.

The Fourth Circuit's standard falls far short of what is required by the terms of Rule 801(d)(2)(B) -- namely, that the defendant have *manifested* an adoption of the contents of the note or writing or a belief in its truth. The Fourth Circuit's decision leaves the truth-finding process open to all "the dangers traditionally recognized as inherent in hearsay, namely the lack of the normal safeguards of oath, confrontation and cross-examination of the credibility of the extrajudicial declarant." *United States v. Watkins*, 519 F.2d 294, 297 (D.C. Cir. 1975).

In sum, the Fourth Circuit's ruling that the unsigned, undated note at issue in this case was admissible as an adoptive statement is both erroneous and in direct conflict with decisions by the Ninth, Tenth, and First Circuits. This Court should grant certiorari to resolve the conflict among the circuits and to clarify the proper standard for admission of documents under Rule 801(d)(2)(B).

II. THE FOURTH CIRCUIT'S ALTERNATIVE GROUND FOR ADMISSION OF THE NOTE AS CIRCUMSTANTIAL EVIDENCE WAS ERRONEOUS AND IS IN DIRECT CONFLICT WITH THE TENTH CIRCUIT'S DECISION IN UNITED STATES V. JEFFERSON

The Fourth Circuit also ruled that the anonymous, undated note was admissible "not to prove the truth of the matter asserted, but 'to show the circumstantial relationship of the parties to the scene, the contraband or other parties.'" (App. 13a (quoting *United States v. Marino*, 658 F.2d 1120, 1124 (6th Cir. 1981)). That ruling is erroneous because the note was admitted into evidence to prove the truth of the matter asserted, not as "background" evidence, and was presented to the jury as direct evidence of Mrs. Grady's alleged participation in the conspiracy charged. Moreover, the note was admitted by the

district court without restriction or instructions to the jury limiting the purposes for which the note might be considered. The Fourth Circuit's ruling that the note, which was clearly inadmissible hearsay, was admissible as circumstantial evidence directly conflicts with the Tenth Circuit's decision in *Jefferson*, 925 F.2d at 1252-54.

In *Jefferson*, the Tenth Circuit made clear that hearsay evidence may not be transformed into nonhearsay "simply by calling it 'circumstantial evidence.'" *Jefferson*, 925 F.2d at 1253 n.12 (citation omitted). In that case, the court held that a pager bill was inadmissible hearsay. In addition to finding that the pager bill was not an adoptive statement, the Tenth Circuit flatly rejected as "without merit" the Government's argument that the trial court's admission of the pager bill did not violate Federal Rule of Evidence 801 because the pager bill was "offered as circumstantial evidence to show . . . the character and involvement of the Defendant." *Id.* at 1252. The Tenth Circuit emphasized that

> [w]hether evidence is offered as circumstantial evidence as opposed to direct evidence has nothing to do with whether it constitutes inadmissible hearsay. Granted the pager bill combined with agent Young's testimony regarding the use of pagers by drug dealers was introduced as circumstantial evidence of [the defendant's] intent to possess and distribute the cocaine. However, the fact that the evidence was introduced to link circumstantially the accused to the crime does not render the hearsay violation any more acceptable. . . . The protection afforded to an accused by Rule 801 should not be discarded simply because the evidence is to be used circumstantially.

Id. at 1252-53.[4] In reaching this conclusion, the Tenth Circuit specifically noted that the hearsay evidence at issue in *Jefferson* (just like the hearsay note at issue in this case) had been admitted at trial to prove the truth of the matters asserted. *Id.* at 1253. Thus, the Tenth Circuit's decision in *Jefferson* would not permit the admission into evidence of the anonymous note at issue in the instant case as circumstantial evidence, and the alternative ground posited by the Fourth Circuit for the admission of the note is in direct conflict with the law of the Tenth Circuit.[5]

Commentators agree that the Tenth Circuit's position is correct. As one leading commentator has explained, permitting the use of otherwise inadmissible hearsay evidence under the rubric of "circumstantial" evidence improperly bypasses the

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4 *Cf. United States v. Williams*, 133 F.3d 1048, 1051 (7th Cir. 1998) (inadmissible hearsay could not be justified on appeal as not offered for truth but as circumstantial evidence "to establish the course of the police investigation"); *United States v. Watkins*, 519 F.2d 294, 296 (D.C. Cir. 1975) (rejecting Government's contention on appeal that hearsay evidence had been offered as circumstantial evidence, where record, including prosecution's opening statement to jury, made clear that receipt was admitted for truth of matter asserted).

5 The Tenth Circuit's ruling in *Jefferson* does not result in undue interference with the Government's ability to prosecute a case. For example, in *United States v. McIntyre*, 997 F.2d 687 (10th Cir. 1993), *cert. denied*, 510 U.S. 1063 (1994), certain notes and receipts were ruled inadmissible hearsay and not admitted for the truth of the matter asserted therein. Nonetheless, in order to link the defendants together in a common scheme and to connect them to certain locations, the Government was allowed to put on testimony as to where the papers were found and as to the fact that the papers bore certain names and addresses on them. *See McIntyre*, 997 F.2d at 702.

protections provided to the truth-finding process by the hearsay rules:

> All hearsay evidence could be viewed as a kind of circumstantial evidence, and all hearsay risks could in that view be transmogrified into mere questions of weight. That course of reasoning, however . . . leads inevitably to error because it bypasses the whole point of the hearsay rule: when the belief of a human being in a matter is used as evidence of a matter, special risks exist, and special safeguards, especially cross-examination, have been designed to deal with them.

Olin Guy Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49, 62-63 (1982); *see also* R. Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 Minn. L. Rev. 423, 431 (1981) (noting with disapproval that some "courts have change[d] hearsay into nonhearsay simply by calling it 'circumstantial evidence'"). This Court should not countenance the significant erosion of the hearsay rules that will result if the Fourth Circuit's decision is allowed to stand.

Furthermore, the Fourth Circuit's ruling that the anonymous note at issue in this case was admissible as circumstantial evidence contravenes the practice of other circuits in other important ways. None of the "links" that "circumstantial" evidence is generally used to demonstrate is present here. *See United States v. Marino*, 658 F.2d 1120, 1124 (6th Cir. 1981) (admitting evidence not for the truth of the matter asserted, but "to show the circumstantial relationship of the parties to the scene, the contraband or other parties"). The note does not refer to Mrs. Grady's co-defendants and does not link her to them. The note does not link Mrs. Grady to the actual contraband that was the subject of the transactions charged. More-

over, while the note does link Mrs. Grady to a particular location, that location is her own home -- a fact that was never in dispute. In addition, nothing ties the anonymous note to the time of the alleged conspiracy. *Cf. United States v. Lamon*, 930 F.2d 1183, 1192 (7th Cir. 1991) (reversing conviction where undated notes "would allow the jury to do no more than speculate that the entries represented transactions during the period of the charged conspiracy"). There is nothing in the contents of the note that indicates when it was written, and the place where it was found -- in a drawer containing papers of various dates -- does not indicate whether the note was written days, months or years before it was found. Nor were the transactions in the conspiracy charged in this case in any way similar to the circumstances apparently indicated by the note. In sum, the note in this case has no "background" significance to the conspiracy charged.

The erroneous admission of the anonymous, undated note violated Mrs. Grady's fundamental right under the Confrontation Clause to cross-examine the witnesses against her. *See Pointer v. Texas*, 380 U.S. 400, 404 (1965) (right of confrontation is "[o]ne of the fundamental guarantees of life and liberty" and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution") (quoting *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899)). The writer of the note was not identified and did not testify at trial. Where, as here, the admission of hearsay evidence violates the Confrontation Clause, a heightened standard for determining harmless error applies. Under that heightened standard, reversal is mandated where, as here, it is clear that the erroneously admitted evidence was not harmless beyond a reasonable doubt. *See Idaho v. Wright*, 497 U.S. 805, 827 (1990).

CONCLUSION

The Court should grant certiorari to resolve the conflicts among the Courts of Appeals as to (i) the correct standard for the admission of a writing as an adoptive statement under Federal Rule of Evidence 801(d)(2)(B) and (ii) the correct standard for the admission of otherwise improper hearsay evidence as "background" or "circumstantial" evidence.

Respectfully submitted,

Douglas W. Dunham*
Ellen P. Quackenbos
Mark S. Cheffo
Matthew I. Cohen
919 Third Avenue
New York, New York 10022
(212) 735-3000
**Counsel of Record*

KYLE O'DOWD
General Counsel
Families Against
Mandatory Minimums
1612 K. Street, N.W.
Washington, D.C. 20006
(202) 822-6700
Of Counsel

APPENDICES

APPENDIX A - EXCERPT OF TRIAL TRANSCRIPT OF OCTOBER 18, 1995 UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[2-15]

Mr. Mangum: Yes, Your Honor. Mr. Hamilton has brought a big blow-up in here today. It may benefit us to [2-16] take it up before the jury comes back.

The Court: All right.

Mr. Mangum: I think it is intended for today.

The Court: Yes, sir.

Mr. Mangum: I brought it up once earlier. It is something that was seized in the house. It's an envelope that somebody has written on, "Lit, I have paid Lucille rent and turned her heat on. I am going to the motel for one more night to get some rest by myself, so give me five rocks and $20.00 and we will add it up tomorrow."

The Court: Where was that found, in the house?

Mr. Hamilton: Your Honor, one other thing I might add, Your Honor, Mr. Mangum read it in its entirety. But in the margin there's also a word, O-S-H-E, Oshe, which we believe is the name that we may be able to connect a little bit later.

Mr. Mangum: It's a child, Your Honor.

Mr. Hamilton: It's a child who lives in the residence or stays in the residence sometimes.

The Court: And where was that found? You may have a seat now, Mr. Mangum.

Mr. Mangum: Thank you, Your Honor.

Mr. Hamilton: Your Honor, we will produce testimony of the Carrboro agent who found this while executing the state search warrant at 110 Eugene Street, which is the residence [2-17] that has been called during the trial. And we will produce evidence that Ms. Grady and Mr. Harris were arrested at 110 Eugene Street. And I don't think it is contested, in any event, that they resided there.

The Court: Were they arrested at the time this was found?

Mr. Hamilton: The same day, I believe. But I could ask Mr. Dolan, to make sure. Executed at the time of arrest.

The Court: All right.

Mr. Hamilton: Of course, we think it's probative because of the reference to rocks, Your Honor. It's also address [SIC] to "Lit," and we produced testimony from Mr. McDowell that Elizabeth Grady has the nicknames of "Litty" and "Lit."

The Court: Now, Mr. Mangum, is your objection based upon the substance of the note, or is it the blow-up that you're concerned about?

Mr. Mangum: The substance of the note.

The Court: You have no objection to the blow-up, if the note itself is admissible? You have no grounds to say you can't blow it up and show it to the jury, do you?

Mr. Mangum: Not particularly.

The Court: So we will wait and see what the government can prove in that respect. Until that time, it will remain turned around.

Mr. Mangum: Well, I don't know how the Court wants [2-18] to proceed, but I was willing to stipulate that she was there when she was arrested. It was her house.

The Court: Well—

Mr. Mangum: And my objections are pretty straightforward.

The Court: What is your objection based upon now?

Mr. Mangum: The rules of evidence, Your Honor.

The Court: What?

Mr. Mangum: Rule 401, relevance; 403, undue prejudice.

The Court: Well, wouldn't it be relevant that a note was found in the place where she lives and where she is, saying, "Give me five rocks"?

Mr. Mangum: No, sir.

The Court: That's not relevant?

Mr. Mangum: It's not dated. It's not signed. We don't know who wrote it. We don't know whether she ever knew about it. We don't know whether it was ever communicated to her. You can see that the spelling is bad and the handwriting is bad.

The Court: Well, let me see if - you may disagree with this analogy - but suppose the evidence is that during these times that we were calling them on the telephone, we had an observation of the house at the same time and there were people coming and going at all hours, staying for a few [2-19] minutes and leaving, coming – other people were coming and knocking on the door, being met at the door. People were then leaving the house. Wouldn't that be some evidence that the jury could find that, in fact, something is going on that supports

the government's theory of conspiracy and activity in the house?

Mr. Mangum: Well, Your Honor, that kind of testimony is always enjoined with some sort of investigative expert testimony to characterize what it means. In addition, it's also cabined within the time framework of the indictment. In this case, it's obvious under 801 that this is hearsay. It's also obvious why the government intends to offer it. They say that it's probative to prove, because it has the word "rock" in it.

The Court: Yes.

Mr. Mangum: Obviously, they hope and intend for the jury to believe that she had rocks to give the writer of the note.

The Court: Right.

Mr. Mangum: That is the most outrageous form of hearsay that you could possibly have, an unknown writer at an unknown time makes a statement that the jury is supposed to believe about my client. I can see constitutional confrontation issues abounding there. How do we cross examine whoever wrote this?

[2-20]

The Court: What if they took it off the person of your client? Would that make any difference?

Mr. Mangum: Well, I would think that that is one of the reasons why I said it's such an outrageous form of hearsay is that they would have to show that she knew – not only that she knew about the letter, which they can't show, but that she didn't contest the contents of what the writer on the note had to say.

The Court: Well, what if they found it on her person when they arrested her, searched her, and found that note on her person? Could the government introduce it then?

Mr. Mangum: I would still have two or three objections, Your Honor.

The Court: The same one?

Mr. Mangum: Well, yeah. But in addition, it's 404(b), other acts evidence. We don't know that it's in the framework of the indictment.

The Court: It may not be, but it's during the time of the indictment. And it seems to me that if it's during the time of the indictment, if it's competent evidence for other reasons, it's competent to consider as against her during the time.

Mr. Mangum: Not insofar as it's hearsay.

The Court: But the hearsay is not a problem if it's in her possession, is it?

[2-21]

Mr. Mangum: Well, I think it is.

The Court: Well, why is it hearsay if it's in her possession? For instance, as an example, the officers are watching the place, and they hear somebody say — This didn't happen, but I'm just giving you an example. They heard somebody shout out, "Litty, do you have some rocks of cocaine for me?" And they heard her answer, "Yes, I do. Come on in and get it." They go in and get it. Now that's hearsay from that person that shouted, because they don't know it was. They just heard a shout in the night, and somebody go up there. That's hearsay. But it's competent, because she is expressing a position on that.

Mr. Mangum: Well, I think you are talking about an exception to the hearsay rule.

The Court: All right. Well, doesn't her possession of the note constitute that same exception?

Mr. Mangum: No.

The Court: Why?

Mr. Mangum: If I wrote you a letter and said please stop beating your wife—

The Court: Yes.

Mr. Mangum: --and you possessed it, that certainly does not mean that you beat your wife.

The Court: Exactly.

Mr. Mangum: Especially if it is an anonymous note.

[2-22]

The Court: But it may be some evidence. If my wife wrote that note or somebody wrote a note and said, "Please stop beating me."

Mr. Mangum: Right.

The Court: And I'm charged with beating my wife, and I have that note, it seems to me that is some evidence. It may be that it's not conclusive, but it's some evidence.

Mr. Mangum: Well, I understand that you can – you can sniff this evidence and think it smells a little bit against my client.

The Court: Right.

Mr. Mangum: But if you analyze the hearsay rules, it's obviously hearsay, because I can just read you the 801, and it's obviously what it says.

The Court: Well, it's obvious that no one knows who wrote that. Everybody would agree to that.

Mr. Mangum: One of the exceptions for what is hearsay is that it is an admission by a party opponent, i.e., my client. To make it an admission, it tells A, B, C, D, E how it can be an admission, and it isn't any one of A, B, C, D, E.

The Court: Okay.

Mr. Mangum: If I could just go through them very briefly. "A party's own statement." No, it's not. "Statement to which the party has manifested an adoption or [2-23] belief in its truth." No, it's not.

The Court: I'm not so sure about that, but go ahead.

Mr. Mangum: Okay. My position is they got no evidence of that, Your Honor.

The Court: Okay.

Mr. Mangum: C, "A statement by a person authorized by the party." We don't know who made the statement. D, "A statement by the party's agent or servant." Certainly, we don't know who that is, especially within the scope of their agency. Or, E, "A statement by a conspirator of a party during the course of and in furtherance of the conspiracy." We don't know who said it. We certainly don't know whether he said it or he said it.

The Court: Or someone else who is a member of the conspiracy, if there is anybody.

Mr. Mangum: Well, we certainly have an ill-defined conspiracy, if it extends beyond the people at this table.

The Court: All right. I understand what you are saying, Mr. Mangum. I am going to not rule on that at this point. However, I will tell you at this point that from what I have heard so far that I believe it turns out – and already there's evidence that she had this house, and that it was found in the house at the time of the arrest – it may be admissible. We will take that when we get to it. I'm just [2-24] telling you the way I lean at this point from hearing what I've heard so far. We will take it up again. I will give you an opportunity.

. . . . . .

[2-60]

Mr. Mangum: May I do that now?

The Court: You can do it during break. What I was—Is that going to be some reason to contest the admissibility of the 24 and 25-A and B?

Mr. Mangum: Well, to get to the bottom line on the envelope –

The Court: Yes, sir.

Mr. Mangum: -- as I say, again, my fundamental point is that it is hearsay. If you believe that it is not hearsay, that it is somehow an exception to the hearsay rule, and it's relevant, then my point is that they have not shown that this is my client's said papers.

The Court: All right. I think that is what the contest is, and you may be able to show that it's not. But I think the government has an opportunity to show that there are things there that would indicate that this is your client's property. But she certainly is in charge of the property. That has never been contested. She is the one who has the property, and they're showing at least that there are female clothes in that room and that the envelopes in the same drawer were at least addressed in part to your client.

[2-61]

Now you may contest that, but I do not believe that it makes it inadmissible as hearsay. This is material that the government is saying is in possession of your client, and you disagree with that, but that is what the jury is for, to determine whether that was possessed by your client.

Mr. Mangum: Your Honor, I guess I have to make the point that even if it is admissible as non-hearsay or an exception to the hearsay rule, that there's still the question of 403.

The Court: The prejudicial effect?

Mr. Mangum: Absolutely.

The Court: Well, if it is admissible and it shows that somebody said something to your client about rocks, that your client had something in her possession about rocks, that certainly is incriminating. What makes it more prejudicial than incriminating, if it is admissible?

Mr. Mangum: Three things in general. Number one what is the character or the nature of incrimination that we're talking about. We're talking about someone said something to her about rocks. This indicates fairly on its face that someone, but we do not know who, at a time we do not know when, for a reason we do not know why, wrote something addressed to a person with my client's name indicating that they believed she would give them rocks.

The Court: Oh, I think if there was material there [2-62] that showed how to cook cocaine into crack, that that type of material is purely hearsay because it's from another person. But we're not talking about hearsay. It can be hearsay; but if it's in possession of your client, then that is not hearsay. Your driver's license issued is hearsay, but it's in your possession. It has your name on it, and that doesn't make it inadmissible. And that's what we're talking about here. Certainly nobody can say that X issued your driver's license, but it's in your possession. And that's the theory that I think you are going on differently from what the government is here. It's not a matter to me of whether the document is hearsay or not. It's a question of whether it is admissible, since it was perhaps at least arguably in your client's possession.

APPENDIX B - DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED APRIL 22, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-4149

No. 96-4177

No. 96-4196

UNITED STATES OF AMERICA

Plaintiff-appellee,

v.

ROBERT ALLEN MERRITT,

ELIZABETH TAYLOR GRADY,

THOMAS ELMORE HARRIS, JR.,

Defendants-Appellants

Appeals from the United States District Court

for the Middle District of North Carolina, at Durham.

William L. Osteen Sr., District Judge. (CR-95-213).

Argued: January 30, 1998

Decided, April 22, 1998

Before RUSSELL[1] and WILKINS, Circuit Judges, and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Ellen Payne Quackenbos, SKADDEN, ARPS, MEAGHER & FLOM, L.L.P., New York, New York; W. David Lloyd, Greensboro, North Carolina, for Appellants. Robert Michael Hamilton, Assistant United States Attorney, Greensboro, North Carolina, for Appellee. ON BRIEF: Mark S. Cheffo, New York, New York, for Appellant Grady; William C. Ingram, FLOYD, ALLEN & JACOBS, L.L.P., Greensboro, North Carolina, for Appellant Merritt. Walter C. Holton, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

OPINION

PER CURIAM:

In this consolidated appeal, Robert Allen Merritt ("Merritt"), Elizabeth Taylor Grady ("Grady") and Thomas Elmore Harris ("Harris"), collectively "defendants," appeal their convictions for conspiracy to possess with intent to distribute crack cocaine base, *see* 21 U.S.C.A. § 846 (West Supp. 1997) and possession of crack cocaine base, *see* 21 U.S.C.A. § 841(a)(1) (West 1981). We affirm.

I.

Merritt, Grady, and Harris were convicted of operating a crack distribution group and crack house in Carrboro, North

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[1] Judge Russell participated in the hearing of this case at oral argument but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

Carolina, near the University of North Carolina's Chapel Hill campus. In early 1994, Carrboro police officers apprehended University of North Carolina student Dennis McDowell (the "informant") in possession of crack cocaine, who later agreed to assist police and the Drug Enforcement Administration by acting as an informant in drug investigations. At the time, the informant had known Grady, Merritt and Harris for approximately nine months. At the request of police, the informant called Grady's residence on numerous occasions to arrange purchases of crack cocaine and its delivery to parking lots near Grady's residence. The deliveries were made by Merritt, Harris, or a third "runner," Eddie Atwater ("Atwater"). The telephone calls and deliveries were recorded, and the deliveries were witnessed by law enforcement officers. A joint indictment was returned in August 1995 against Grady, Merritt, Harris and Atwater, alleging a conspiracy to possess with intent to distribute crack cocaine, as well as possession of crack cocaine.[2]

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[2] All defendants were convicted of Count 1 of the indictment, for conspiracy to possess with intent to distribute cocaine base. The remainder of the counts were for possession with intent to distribute cocaine base. Grady was convicted of Count 2, Merritt was convicted of Counts 2 through 5, and Harris was convicted of Counts 4 and 5. At the time of trial, Atwater was awaiting separate trial for his alleged participation in the conspiracy.

II.

We first address two issues raised by all defendants concerning the district court's admission of evidence at trial. We affirm as to each.[3]

A.

Defendants first contend that the district court erred in admitting into evidence an anonymous note that had been seized during the execution of a search warrant at defendant Grady's residence. Defendants contend the note was hearsay under Fed. R. Evid. 801(c), and that it should have been excluded under Fed. R. Evid. 403. We review the district court's rulings for an abuse of discretion. *See United States v. Whittington*, 26 F.3d 456, 465 (4th Cir. 1994).

Documents found in a defendant's possession may be admitted, not to prove the truth of the matter asserted, but "to show the circumstantial relationship of the parties to the scene, the contraband or other parties." *United States v. Marino*, 658 F.2d 1120, 1124 (6th Cir. 1981). Furthermore, a document found in a defendant's possession may be admissible as an "adoptive admission" under Fed. R. Evid. 801(d)(2)(B). "Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written statement becomes an adoption of its contents." *Marino*, 658 F.2d at

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[3] Defendants also collectively challenge *21 U.S.C. § 841* and § 2D1.1 of the United States Sentencing Guidelines, which impose a 100 to 1 ratio in the penalties for cocaine and cocaine base. Contending that the provisions contain an ambiguity in the application of the penalties, defendants argue that the rule of lenity requires a sentencing court to impose the lesser penalty. Defendants, however, concede that this issue was decided adversely to their position in *United States v. Fisher, 58 F.3d 96, 98-99 (4th Cir. 1995)*. Accordingly, we find no merit to this exception.

1125. "[S]o long as the surrounding circumstances tie the possessor and the document together in some meaningful way, the possessor may be found to have adopted the writing and embraced its contents." *United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994). Such adoptive admissions are not hearsay and are properly admitted into evidence. *See e.g., id.* at 22-25 (customer receipt for a Postal Service money order found in apartment used as a drug distribution outlet was admissible as an adoptive admission); *United States v. Ospina*, 739 F.2d 448, 451 (9th Cir. 1984) (business cards with handwritten notes and motel receipt found in defendant's hotel room were admissible as adoptive admissions). Here, the anonymous note was addressed to "Lit," Grady's nickname. It was found in a dresser drawer in a bedroom containing a woman's clothing, along with other documents bearing Grady's name, including a county tax receipt. The author of the note, albeit unknown, was clearly desirous of obtaining "rock" cocaine.[4] We are satisfied that the content of the note and its location sufficiently tie the document to Grady and her co-conspirators, and is consistent with other evidence that defendants were operating a crack distribution business from Grady's residence. Accordingly, the district court did not abuse its discretion in admitting the note as evidence.

Defendants also contend that the district court should have excluded the note under Fed. R. Evid. 403, asserting that its probative value was substantially outweighed by its prejudicial effect. We disagree. The note, addressed to Grady and obviously evidencing drug activity, was admitted as additional evidence of Grady's knowledge of and participation in the drug conspiracy and to corroborate the taped drug negotiations

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[4] The note was written on an envelope and read as follows: "Lit, I have paid Lucille rent and turned her heat on. I am going to the motel for one more night and get some rest by myself, so give me five rocks and $20.00 and we will ... add it up tomorrow." J.A. 430.

between defendants and the informant. Accordingly, the district court did not abuse its discretion in concluding that the note's probative value outweighed its prejudicial effect and in admitting it into evidence.

B.

Defendants next contend that the district court erred in admitting tape recordings of telephone conversations between the informant and defendants to set up controlled crack purchases, alleging the government failed to properly authenticate the tapes. Decisions of the district court to admit tape recordings into evidence are reviewed for an abuse of discretion, and we will not find error unless the foundation for admission is "clearly insufficient to insure the accuracy of the recording." *United States v. Branch*, 970 F.2d 1368, 1372 (4th Cir. 1992) (internal quotation marks omitted). In determining the admissibility of a recording, courts are guided by seven factors outlined in *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959).[5] Defendants argue that in order to authenticate the

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[5] The specific factors are:

(1) That the recording device was capable of taking the conversation now offered in evidence.

(2) That the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes, additions or deletions have not been made in the recording.

(5) That the recording has been preserved in a manner that is shown to the court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

(continued...)

recordings the government was also required to show that the informant listened to the tapes immediately after the recording and again immediately prior to his testimony at trial. This court has never embraced this position; rather, recordings are admissible so long as the testimony is "sufficient to support a finding by the jury that the tapes [are] what the Government claimed." *Branch*, 970 F.2d at 1372. Here the government established how the calls and recordings were made, and demonstrated a chain of custody for each. Additionally, the government played the tapes for the informant on the morning of trial and confirmed that the tapes accurately reflected the conversations that had occurred. Accordingly, we conclude the district court did not abuse its discretion in admitting the tapes as evidence.

III.

Defendant Grady has independently raised several additional exceptions to her convictions and sentence. We address and reject each in turn.

A.

Grady was convicted of conspiracy to possess and distribute crack cocaine from August 1994 to August 1995, and of possession with intent to distribute crack cocaine on December 8, 1994. She contends the evidence produced at trial was insufficient to support her convictions. We disagree. The evidence revealed that Grady was directly involved in at least

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[5](...continued)

Branch, 970 F.2d at 1371, n.3 (quoting *McKeever*, 169 F. Supp. at 430); *see also United States v. Long*, 651 F.2d 239, 242 (4th Cir. 1981). The factors provide guidance to the trial judge in ruling on an authentication question; however, proof of each factor is not required in every case. *See Branch*, 970 F.2d at 1371-72.

three undercover purchases of crack cocaine by the informant. On September 14, 1994, the informant called Grady's residence and asked if she could "do five" rocks of crack cocaine. After Grady confirmed that she could, she gave the telephone to Merritt to arrange a meeting place and Merritt did, in fact, deliver five rocks of crack cocaine to the informant shortly thereafter. The informant paid Merritt $100 for 5 rocks of crack cocaine at $20.00 per rock. On October 13, 1994, the informant again called Grady, advised her that he wanted to get "fifteen," and told her that he had "300 beans." The informant testified that "300 beans" meant 300 dollars -15 rocks of crack cocaine at $20 each. Grady asked him when he wanted to get it and, upon being told that he wanted it "sometime tonight," she told him, "Well, let us know." In a second conversation, Grady assured the informant that she would wrap the crack in "brown wrapper or something" and Atwater later delivered crack cocaine to the informant. On December 8, 1994, the informant called Grady a third time to purchase crack cocaine and Merritt later delivered one $20 rock. In addition to these transactions, the informant set up several purchases directly with Harris and Merritt during 1994 and 1995, which originated from Grady's residence and were witnessed by law enforcement officials. An ensuing search warrant, executed at Grady's residence on August 30, 1995, uncovered the handwritten note addressed to Grady which evidenced an additional drug transaction between her and an unknown buyer.

In reviewing a challenge to the sufficiency of the evidence, we ask "whether, viewing the evidence in the light most favorable to the government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (emphasis in original). We are satisfied that there was sufficient evidence to support each of Grady's convictions.

B.

Grady also challenges her sentence on three separate grounds. We address these contentions in turn.

Grady first urges that we vacate her sentence and remand her case for resentencing because the district court violated Fed. R. Crim. P 32(c)(3)(A) by neglecting to expressly inquire as to whether she had reviewed and discussed her presentence report with counsel.[6] Because this issue was not raised before the district court, we review it under the plain error standard. See *United States v. Lockhart*, 58 F.3d 86, 88 (4th Cir. 1995). "[B]efore vacating [Grady's] sentence, we must be convinced that (1) an error was committed; (2) the error was plain; and (3) the error affected Grady's substantial rights." *Id.* If so, "we must also decide whether the error is of a type that 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). In the instant case, there is nothing in the record which affirmatively demonstrates that Grady read the presentence report and discussed it with her counsel before being sentenced. As a result, we are forced to conclude that the district court committed plain error. *See Lockhart*, 58 F.3d at 88-89. However, we must still determine whether the error affected the outcome of Grady's sentencing hearing, i.e. whether it was prejudicial. *Id.* at 88-89.

We note first that Grady does not contend that she did not read the report, or that she did not discuss its contents with her counsel prior to sentencing. Instead, she proceeds directly to the argument that she could have challenged the attribution of 30 grams of crack cocaine to her for sentencing purposes,

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[6] Federal Rule of Criminal Procedure 32(c)(3)(A) requires the sentencing court to "verify that the defendant and defendant's counsel have read and discussed the presentence report."

contending that the distribution of this amount during the conspiracy was not foreseeable as to her. This argument is unavailing. Under the sentencing guidelines, a "defendant should be held accountable for the conduct of others that was both in furtherance of the conspiracy and reasonably foreseeable in connection with the conspiracy." *United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir. 1994). Thus, the amount that may be attributed to Grady is not limited to the amounts for which she personally took orders. *See id.* Grady's presentence report outlines, in detail, sixteen crack cocaine purchases that were made from the conspiracy group. Testimony at trial showed clearly that the vast majority of the purchases originated from Grady's house, which the evidence revealed to be the center of operations for the drug enterprise. As evidenced by the tape recordings, Grady was directly involved in at least three controlled drug buys, and in these three, two different runners were dispatched to deliver the drugs to the informant. Thus, the only reasonable inference from the evidence presented to the jury was that she was an active participant in the drug distribution conspiracy, and the jury so found.

Grady did not testify at trial, but did choose to address the district court judge at sentencing. She contended she was not involved with her two co-defendants and had been trying to get them to quit. She specifically denied to the district court judge participating in any drug-related calls for drugs:

THE COURT:	Are you saying that you didn't take any telephone calls dealing with somebody wanting to purchase drugs?
DEFENDANT GRADY:	Not as I know of.

J.A. 450. Grady can hardly be prejudiced by a lack of opportunity to present evidence showing only a limited criminal liability when she denied to the district court any criminal liability at all. Furthermore, any argument that a lack of foreseeability could be established by the fact that more sales were attributed to her than those with which she was personally involved would be without merit, as would be the argument that insignificant variations in sales amounts could be a basis for showing unforeseeability.

Grady's second allegation of prejudice is that she could have challenged a statement in the presentence report that she was the leader of the conspiracy, which she contends may have influenced the sentencing outcome. We find this contention to be equally meritless. Although the presentence report does characterize Grady as the "lead" person, it made no upward adjustment for her role in the offense. Furthermore, the district court, presented with an agreed upon guideline range of 78 to 97 months, sentenced Grady to 80 months imprisonment -- only two months over the minimum guideline sentence -and made no reference to a "lead" role to justify the sentence imposed.

Accordingly, Grady has failed to show that her sentencing would have been affected by challenges to the drug amounts attributed to her or to the characterization of her role in the conspiracy. We conclude that the technical Rule 32 violation did not affect her substantial rights, and we decline to vacate Grady's sentence.

Grady next contends that she is entitled to resentencing because the district court did not make a factual determination of the amount of drugs foreseeable to her. In the absence of a timely objection by the defendant, a district court need not conduct an independent factual inquiry and may adopt factual findings contained within the presentence report. *See United*

States v. Gilliam, 987 F.2d 1009, 1013 (4th Cir. 1993). At sentencing, Grady's trial counsel agreed that the presentence report accurately reflected the applicable offense level and guideline range, and did not object to the district court's explicit adoption of the presentence report's factual findings and guideline application. Accordingly, the district court was not required to conduct an independent factual inquiry into the amount of drugs foreseeable to Grady and did not err in attributing to Grady the total quantity of crack sold by the members of the conspiracy.

Grady's final contention is that she received ineffective assistance of counsel because her trial counsel failed to object to the amount of drugs attributed to her at sentencing. Claims of ineffective assistance of counsel are generally not appropriate on direct appeal and should be raised in a motion pursuant to 28 U.S.C.A. § 2255 (West 1994), unless the record conclusively shows that counsel did not provide effective assistance. *See United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997). Having carefully reviewed the record, we conclude that it does not conclusively show that counsel's representation fell below an objective standard of reasonableness. *See generally Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Accordingly, Grady's claim of ineffective assistance of counsel is not properly before this court and must be dismissed.

IV.

Defendant Harris raises an independent challenge to his conviction, contending that the district court erred in denying his motion for mistrial because Grady's counsel, in closing argument, implied that Grady would have testified against her son and co-defendant Harris had she testified at trial. Harris argues that the challenged comment by Grady's attorney "so infected the trial with unfairness as to make the resulting

conviction a denial of due process." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994) (internal quotation marks omitted). We disagree. While the comment was improper, the district court immediately issued an appropriate curative instruction, warning the jury that arguments of counsel were not evidence and that the jury was not to speculate as to why Grady did not testify. We also reject Harris' contention that the comment drew attention to the fact that Harris did not testify. We find nothing in the comment which would support this interpretation and, in any event, the district court also instructed the jury that a defendant is not required to produce any evidence and that no inference whatsoever can be drawn from the fact that a defendant does not testify. Accordingly, the district court did not err in denying Harris' motion for a mistrial.

V.

For the foregoing reasons, we affirm the convictions of Merritt, Grady, and Harris.

AFFIRMED

Supreme Court, U.S.
FILED
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(2)

No. 98-158

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELIZABETH TAYLOR GRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
VICKI S. MARANI
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether, in a prosecution involving the sale of rocks of crack cocaine, the district court abused its discretion in admitting into evidence an anonymous note asking for "five rocks," where the note was addressed to petitioner and found in her house.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a-22a) is unpublished, but the decision is noted at 145 F.3d 1327 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1998. The petition for a writ of certiorari was filed on July 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Middle District of North Carolina found petitioner guilty of conspiring to possess cocaine base (crack) with

intent to distribute it, in violation of 21 U.S.C. 846, and of possessing cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced her to concurrent terms of 80 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 10a-22a.

1. Petitioner and two co-defendants, Robert Allen Merritt and Thomas Elmore Harris, Jr., formed a crack distribution group that operated out of petitioner's house in Carrboro, North Carolina, near the University of North Carolina's Chapel Hill campus. In early 1994, Carrboro police officers apprehended Dennis McDowell, a student at the University, in possession of crack cocaine. McDowell later agreed to assist police and the Drug Enforcement Administration as an informant in drug investigations. At that time, McDowell had known petitioner, Merritt, and Harris for about nine months. At the request of police, McDowell called petitioner's residence on numerous occasions to arrange purchases of crack cocaine and its delivery to parking lots near petitioner's residence. Merritt, Harris, or a third man, Eddie Atwater, made the deliveries. Law enforcement officers recorded the telephone calls and deliveries and witnessed the deliveries. Pet. App. 11a-12a, 15a-16a, 19a.[1]

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[1] The evidence showed that petitioner was directly involved in at least three undercover purchases of crack cocaine by the informant McDowell. Pet. App. 16a-17a, 19a.

On September 14, 1994, McDowell called petitioner's residence and asked if she could "do five" rocks of crack cocaine. After petitioner confirmed that she could, she gave the telephone to Merritt to arrange a meeting place. Merritt delivered five rocks of crack cocaine to McDowell shortly thereafter. McDowell paid Merritt $100, or $20 per rock. Pet. App. 17a.

Based on that evidence, law enforcement officers obtained a search warrant for petitioner's residence. On August 30, 1995, during the execution of that search warrant, law enforcement officers seized an anonymous note handwritten on an envelope. Pet. App. 17a; GX 24. The note was addressed to "Lit," petitioner's nickname. The note read:

> Lit I have payed Lucille rent and turned her heat on. I am going to the motel for one more night and get some rest by myself so give me five rocks and $20 dollars and we will * * * add it up tomorrow.

C.A. App. 430; Pet. App. 14a n.4. The note was in a dresser drawer that also contained a woman's clothing and other documents bearing petitioner's name, including a county tax receipt. Pet. App. 13a-14a.

2. At trial, the government contended that the note was relevant and admissible because of its reference to "rocks" and because it was addressed to petitioner

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On October 13, 1994, McDowell again called petitioner. He told her that he wanted to get "fifteen" and that he had "300 beans." (McDowell testified that he was ordering 15 rocks of crack cocaine at $20 each, for a total of $300.) Petitioner asked him when he wanted to get it, and when he replied "sometime tonight," she said, "Well, let us know." In a second conversation, petitioner assured McDowell that she would wrap the crack "in brown wrapper or something." Atwater later delivered crack to McDowell. Pet. App. 17a.

On December 8, 1994, McDowell called petitioner a third time to buy crack cocaine, and Merritt later delivered one $20 rock to him. Pet. App. 17a.

In addition to the above transactions, McDowell set up several purchases directly with Harris and Merritt in 1994 and 1995. These purchases, observed by law enforcement officers, also originated at petitioner's residence, the center of operations for the drug enterprise. Pet. App. 17a, 19a.

under her nickname. C.A. App. 178. Petitioner's attorney acknowledged that the note had "some relevance," *id.* at 223-224, in that "on its face" the note showed that "someone * * * wrote something addressed to a person with my client's name indicating that they believed she would give them rocks," *id.* at 220. See also *id.* at 222 ("you can fairly conclude that someone thought she would give them rocks"). He nonetheless objected to admitting the note, on the grounds that it was hearsay, *id.* at 180, 183, 219, which "d[id]n't really add much" to the government's "pretty good evidence to proceed with against [petitioner]," *id.* at 224, including the tape recordings and McDowell's testimony, *id.* at 223. He also argued that what probative value the note did have was substantially outweighed by the danger of unfair prejudice. *Id.* at 179, 220, 223-224.

The district court found the note relevant and admissible. C.A. App. 223-224, 231. The court explained that the note was not inadmissible as hearsay, *id.* at 221, because the note was in petitioner's possession, *id.* at 181-182, 221,[2] and it "shows that somebody said something to [petitioner] about rocks, that [petitioner] had something in her possession about rocks," *id.* at 220. The court further explained that the note was not unfairly prejudicial simply because it was incriminating. *Id.* at 220, 224.

Immediately after admitting the note, the district court cautioned the jury to "consider the circum-

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[2] The court pointed out that "[petitioner] certainly is in charge of the property. That has never been contested." C.A. App. 219. (Earlier, defense counsel had offered to stipulate that petitioner lived in the house, *id.* at 213, "that she was in control of the house," *ibid.*, "that she has been there since 1993, and stayed there continuously all of 1994 and 1995," *ibid.*, and that the tax records found in the same drawer as the note "are in her name," *ibid.*).

stances" of "where it was and how it was found, and that sort of thing. * * * [I]t's your determination as to whether it applies to [petitioner] or not." C.A. App. 232-233.

3. On appeal, petitioner argued that the district court erred by admitting the note. The court of appeals affirmed. Rejecting petitioner's claim that "the note was hearsay under Fed. R. Evid. 801(c), and that it should have been excluded under Fed. R. Evid. 403," the panel held that the district court had not abused its discretion by admitting it into evidence. Pet. App. 13a.

With respect to the hearsay claim, the court noted that "[d]ocuments found in a defendant's possession may be admitted, not to prove the truth of the matter asserted, but to show the circumstantial relationship of the parties to the scene, the contraband or other parties." Pet. App. 13a (internal quotation marks omitted). The court also noted that a person's possession of a document was an adoption of its contents, thereby removing it from the hearsay exclusion, "[s]o long as the surrounding circumstances tie the possessor and the document together in some meaningful way." Pet. App. 14a (quoting *United States* v. *Paulino*, 13 F.3d 20, 24 (1st Cir. 1994)). See also Fed. R. Evid. 801(d)(2)(B). The court concluded that "the content of the note and its location" were sufficient to tie petitioner and the note together, and therefore the district court had discretion to admit it. Pet. App. 14a.

As for the Rule 403 claim, the panel "disagree[d]" with petitioner that the probative value of the note was substantially outweighed by its prejudicial effect. Pet. App. 14a. The panel reasoned that "[t]he note, addressed to [petitioner] and obviously evidencing drug activity, was admitted as additional evidence of [petitioner's] knowledge of and participation in the drug

conspiracy and to corroborate the taped drug negotiations between defendants and the informant." *Id.* at 14a-15a. See also *id.* at 17a (note showed an "additional" drug transaction between petitioner and an unknown buyer).

ARGUMENT

Renewing her challenge to the admissibility of the note, petitioner contends that the Court should resolve what she claims are intercircuit conflicts on when possession of a document constitutes an adoptive admission under Federal Rule of Evidence 801(d)(2)(B), Pet. 7-13, and on when a writing may be admitted as circumstantial evidence of guilt, Pet. 13-17. There are no conflicts calling for this Court's review. And even if there were error in admitting the note, it was clearly harmless beyond a reasonable doubt.

1. Petitioner's claim of a conflict fails at the outset because the court of appeals resolved her appeal in a per curiam, unpublished decision. According to the Fourth Circuit's internal rules, unpublished decisions are not precedential and are binding only upon the parties immediately before the court. See *Hogan* v. *Carter*, 85 F.3d 1113, 1118 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 408 (1996). The disposition below, therefore, does not create law for the Fourth Circuit and cannot implicate an intercircuit conflict that might warrant review.

2. a. Petitioner errs, in any event, in arguing that the disposition creates or widens an intercircuit conflict concerning adoptive admissions. Under Federal Rule of Evidence 801(d)(2)(B), an assertion is not hearsay if it is offered against a party and is "a statement of which the party has manifested an adoption or belief in its

truth[.]"[3] According to the Advisory Committee Notes, "[a]doption or acquiescence may be manifested in any appropriate manner. * * * The decision in each case calls for an evaluation in terms of probable human behavior." Fed. R. Evid. 801(d)(2)(B). The district court was within its discretion in finding that petitioner "manifested an adoption or belief in its truth" by retaining the note in her house ("the center of operations for the drug enterprise," Pet. App. 19a) among her personal effects and records as evidence of the author's debt to her for drugs and money ("give me five rocks and $20 dollars and we will * * * add it up tomorrow," C.A. App. 430; Pet. App. 14a n.4).

Petitioner argues that the Fourth Circuit in this case and the Sixth Circuit in *United States* v. *Marino*, 658 F.2d 1120 (6th Cir. 1981), have held that "possession equals adoption," Pet. 10, while the First, Ninth, and Tenth Circuits require "possession plus," see, *e.g.*, *Paulino*, 13 F.3d at 24; *United States* v. *Ospina*, 739 F.2d 448, 451 (9th Cir. 1984), cert. denied, 471 U.S. 1126

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[3] There is a substantial question whether the note here constituted an "assertion," as it simply communicated a request, demand, or order. Such a communication is neither true nor false and hence is not a "statement" for purposes of the hearsay rule. See, *e.g.*, *United States* v. *Hicks*, 848 F.2d 1, 3 (1st Cir. 1988) ("request for assistance" presents "no hearsay problem" because "there could be no 'truth' or falsity" in it); *United States* v. *Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984) ("An order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth."); *United States* v. *Keane*, 522 F.2d 534, 558 (7th Cir. 1975) (where comment at issue was "similar to an order," it was not hearsay because it was "not capable of being true or false"), cert. denied, 424 U.S. 976 (1976). Viewed as a request or order, the note presents no hearsay problems, and because the note is more probative than prejudicial, the district court did not err by admitting it.

(1985); *United States* v. *Jefferson*, 925 F.2d 1242, 1253 n. 13 (10th Cir.), cert. denied, 502 U.S. 884 (1991).

The Fourth Circuit's opinion did not adopt a strict rule that possession of a document alone constitutes an adoptive admission. While the panel quotes *Marino*, stating, "possession of a written statement becomes an adoption of its contents," Pet. App. 13a (quoting *Marino*, 658 F.2d at 1125), it then quotes *Paulino*, "[s]o long as the surrounding circumstances tie the possessor and the document together in some meaningful way, the possessor may be found to have adopted the writing and embraced its contents," *id.* at 14a (quoting *Paulino*, 13 F.3d at 24), and cites *Ospina*, *ibid.* Thus, even if the disposition below could be deemed to have precedential value, it would not stand for the proposition that "possession equals adoption."

Nor does the Sixth Circuit's decision in *Marino*. In *Marino* the defendants failed to object at trial to the documents whose admissibility they were challenging on appeal; the Sixth Circuit held that, "[b]ecause the admission of the documents was not plain error, the issue is not reviewable on appeal." *Marino*, 658 F.2d at 1124. Although the court went on to say that, "[i]n any event, the district court did not err in admitting the documents," the court's decision rests on the finding of no plain error. Thus, the court's additional statement that the defendants' possession of airline tickets and other documents "constituted an adoption," *id.* at 1124-1125, was dictum.

In any case, in a decision issued not long after *Marino*, the Sixth Circuit confirmed that, with regard to oral statements, "[a] defendant cannot adopt an out-of-court statement as his own without some affirmative action on his part." *Poole* v. *Perini*, 659 F.2d 730, 733 (6th Cir. 1981), cert. denied, 455 U.S. 910 (1982). See

also *Fuson* v. *Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (relying on the language quoted from *Poole*), cert. denied, 478 U.S. 1020 (1986). While *Poole* involved an out-of-court oral statement, its general pronouncement regarding adoptive admissions implies that the law in the Sixth Circuit is not inconsistent with that in the circuits cited by petitioner. See *Paulino*, 13 F.3d at 24 ("so long as the surrounding circumstances tie the possessor and the document together in some meaningful way, the possessor may be found to have adopted the writing and embraced its contents"); *Ospina*, 739 F.2d at 451 (relying on *Marino*); *United States* v. *Carrillo*, 16 F.3d 1046, 1049 (relying on "the rule of *Ospina*"), aff'd in part, rev'd in part, *United States* v. *Corona*, 34 F.3d 876 (9th Cir. 1994); *United States* v. *Ordonez*, 737 F.2d 793, 800 (9th Cir. 1983) (distinguishing *Marino* on the grounds that, there, review was for plain error and the evidence at issue "was not offered for the truth of the matter asserted"); *Poy Coon Tom* v. *United States*, 7 F.2d 109, 110 (9th Cir. 1925) (admissibility of letter in defendant's possession pertaining to a drug transaction requires "proof tending to show that the letter was answered or otherwise acted upon"; pre-Federal Rules of Evidence decision last cited by Ninth Circuit in *Ordonez*); *Jefferson*, 925 F.2d at 1253 n.13 ("mere possession" of a bill is not an adoption of its contents).

b. Petitioner also errs in contending that the decision below conflicts with the Tenth Circuit's decision in *Jefferson* on the question of when a writing may be admitted as circumstantial evidence of guilt. Petitioner asserts that the Fourth Circuit "alternatively ruled that the note was admissible, 'not to prove the truth of the matter asserted, but to show the circumstantial relationship of the parties to the scene, the contraband

or other parties.'" Pet. 4 (quoting Pet. App. 13a). It is not at all clear that the panel so ruled. While the opinion states that, "[d]ocuments found in a defendant's possession may be admitted, not to prove the truth of the matter asserted, but 'to show the circumstantial relationship of the parties to the scene, the contraband or other parties,'" Pet. App. 13a (quoting *Marino*, 658 F.2d at 1124), the court devoted the greater part of its discussion of the law to a description of the requirements for an adoptive admission. See *id.* at 14a.

In any event, the *Jefferson* case on which petitioner relies is distinguishable. In *Jefferson*, the government attempted to avoid a hearsay problem by arguing that a pager bill should be admitted as circumstantial evidence to show the defendant's character and involvement with the crime. See 925 F.2d at 1252. Because any conclusion about the defendant's character or involvement relied on the truth of the matters asserted in the pager bill, the court found the bill hearsay and thus inadmissible. *Id.* at 1252-1253. The court emphasized that hearsay is inadmissible regardless of whether it is offered as circumstantial or direct evidence. *Id.* at 1253. In this case, the panel did not suggest otherwise. Instead, the panel noted that documents found in the defendant's possession may be admitted for purposes *other* than to prove the truth of the matters asserted therein, such as to show the circumstantial relationship of the parties to the scene. See Pet. App. 13a.

3. Finally, any error in admitting the note was harmless.[4] As the court of appeals explained, the note

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[4] That is the case even under the more stringent "harmless beyond a reasonable doubt" standard urged by petitioner on the premise that the admission of hearsay evidence here violated the

was simply "additional evidence of [petitioner's] knowledge of and participation in the drug conspiracy" and was used "to corroborate the taped drug negotiations between defendants and the informant." Pet. App. 14a-15a. Indeed, in opposing admission of the note at trial, defense counsel argued that it "doesn't really add much" to the evidence against petitioner, C.A. App. 224, which already included the tape recordings and "the testimony of the cooperating witness," *id.* at 223; see note 1, *supra*. Furthermore, the district court cautioned the jurors that the note was not dated and that they would have to decide whether it applied to petitioner. *Id.* at 232-233. In these circumstances, admission of the note cannot be said to have affected the outcome of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
VICKI S. MARANI
Attorney

SEPTEMBER 1998

Confrontation Clause. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986).

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

KYLE O'DOWD
General Counsel
Families Against
Mandatory Minimums
1612 K. Street, N.W.
Washington, D.C. 20006
(202) 822-6700
Of Counsel

DOUGLAS W. DUNHAM*
ELLEN P. QUACKENBOS
MARK S. CHEFFO
MATTHEW I. COHEN
919 Third Avenue
New York, New York 10022
(212) 735-3000
**Counsel of Record*

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ARGUMENT

Contrary to the Government's contentions, the Petition squarely presents important evidentiary issues under Federal Rule of Evidence 801 that are the subject of conflicting rulings in the United States Courts of Appeals. Relying on Sixth Circuit precedent, the Fourth Circuit's decision in this case approved the admission of evidence that would incontestably be inadmissible hearsay in the Ninth, Tenth and First Circuits. This evidence consisted of an unsigned, undated note scrawled on the back of an envelope and found stuffed in a drawer in Petitioner's house with a large quantity of other papers bearing the names of several other persons. This note was admitted, over hearsay and Confrontation Clause objections, solely on the basis that it was in the "possession" of Petitioner. *See* Pet. App. 9a. The Government does not dispute the fact that no evidence of any kind was presented regarding who wrote the note or when, or whether Petitioner ever saw or read the note, much less whether Petitioner acted upon it or responded to it.

The Fourth Circuit's ruling in this case, and the Sixth Circuit decision it relied upon, are fundamentally irreconcilable with the standard that the Ninth Circuit has adhered to for more than seventy years. Under the Ninth Circuit rule, evidence such as this note is inadmissible hearsay "in the absence of proof tending to show that the letter was answered or otherwise acted upon." *United States v. Ordonez*, 737 F.2d 793, 801 (9th Cir. 1983) (quoting *Poy Coon Tom v. United States*, 7 F.2d 109, 110 (9th Cir. 1925)). In accord with the Ninth Circuit, the Tenth and First Circuits also have flatly rejected the rule that possession of a written document is sufficient to manifest adoption of its contents. *See United States v. Jefferson*, 925 F.2d 1242 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991); *United States v. Paulino*, 13 F.3d 20 (1st Cir. 1994).

The Government tries to argue away this direct conflict among the Courts of Appeals, incorrectly contending that the Sixth Circuit's holding in *United States v. Marino*, 658 F.2d

1120 (6th Cir. 1981), which the Fourth Circuit followed in holding that the note was admissible, was mere dictum. This contention ignores the long established rule, recognized by this Court, that an alternate ground for a decision -- such as the Sixth Circuit's ruling in *Marino* that possession constitutes adoption -- is not obiter dictum. Rather, such an alternate ground is a statement of law and has binding precedential value. Thus, notwithstanding the fact that the Fourth Circuit's decision in this case was unpublished, there is a clear conflict among the circuits which merits resolution by this Court. Indeed, where, as here, there is a direct inter-circuit conflict, this Court has not hesitated to review unpublished decisions.

Moreover, the second question presented by this Petition is also the subject of a direct conflict among the Courts of Appeals. The Fourth Circuit's ruling that the note in this case was also admissible as "background" or "circumstantial" evidence conflicts directly with the Tenth Circuit's ruling in *Jefferson* that otherwise inadmissible hearsay, used at trial for the truth of the matter asserted, may not be justified subsequently as admitted to show the circumstantial relationship of the parties to the scene or each other.

Finally, the Government's contention that the error in this case was harmless and that therefore the Court should not grant certiorari is meritless. The note was displayed before the jury in "blown-up" format and was emphasized by the prosecutor in his closing statement as directly supporting Petitioner's guilt. Under any standard, but particularly under the heightened standard of review for constitutional error, which is mandated in this case under the Confrontation Clause, the admission of the note was harmful error.

I. The Fourth and Sixth Circuits Are in Direct Conflict with the Ninth, Tenth and First Circuits Regarding the Proper Standard for Admission into Evidence of a Writing as an Adoptive Statement

Contrary to the Government's assertion, there is a direct conflict between the Fourth and Sixth Circuits and the Ninth, Tenth, and First Circuits regarding the standard for admitting a written document as an adoptive statement under Federal Rule of Evidence 801(d)(2)(b). The Government is incorrect in contending that the Sixth Circuit's ruling in *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981), that possession constitutes adoption is dictum. *See* Govt. Br. at 8. Rather, the Sixth Circuit provided two alternate grounds for rejecting the evidentiary arguments raised by the appellant in that case. As the Government notes, the Sixth Circuit ruled that the admission of the documents at issue in *Marino* was not plain error. The Sixth Circuit also held, however, that the documents in question were admissible for the truth of the matter asserted "because the defendants' possession of the tickets and the other documents constituted an adoption." *Marino*, 658 F.2d at 1125. As this Court has stated, "[w]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."). Thus, "'[i]t has long been settled that all alternative rationales for a given result have precedential value.'" *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (citation omitted). Clearly,

the Sixth Circuit's ruling in *Marino* that possession constitutes adoption is binding precedent and the law of the Sixth Circuit.[1]

The Sixth Circuit's ruling in *Marino* and the Fourth Circuit's ruling in the present case, which follows *Marino*, *see* Pet. App. 13a, are in direct conflict with rulings by the Ninth, Tenth and First Circuits. *See United States v. Carillo*, 16 F.3d 1046, 1048-49 (9th Cir. 1994); *United States v. Ospina*, 739 F.2d 448, 450 (9th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985); *United States v. Ordonez*, 737 F.2d 793, 799-801 (9th Cir. 1983); *United States v. Jefferson*, 925 F.2d 1242, 1253 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991); *United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994); Petition at 7-13. Indeed, the Tenth Circuit in *Jefferson* recognized the split in authority, explicitly rejecting the rule articulated by the Sixth Circuit in *Marino* and adopting a contrary rule:

> We are aware of the approach taken by the Sixth Circuit in *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981), where it held that an airline ticket used at trial to prove that "the defendants traveled in interstate commerce . . . was admissible because the defendants' possession of the documents constituted an adoption." The court stated: "Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written

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[1] Contrary to the Government's contention, the holding in *Marino* has not been modified or overruled by *Poole v. Perini*, 659 F.2d 730, 733 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). *Poole* did not mention, much less purport to overrule, *Marino*. Moreover, *Poole* did not address the fundamental question presented here -- namely whether mere possession of a written document can constitute affirmative action manifesting adoption of the statements contained in the document.

> statement becomes an adoption of its contents." *Id.* We decline to apply the approach taken by the Sixth Circuit in *Marino* to this case. We can think of too many cases where the mere possession of a [document] in no way constitutes an adoption of its contents.

Jefferson, 925 F.2d at 1253 n.13. The First Circuit in *Paulino* also notes the divergent holdings of the Courts of Appeals and follows the Ninth Circuit's rule as set forth in *Ospina*. *See United States v. Paulino*, 13 F.3d at 24 ("We think that the correct approach, exemplified by *Ospina*, is that 'possession plus' can evidence adoption.").[2]

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[2] The Government incorrectly suggests that there is some question as to whether the note in this case is an assertion for purposes of the hearsay rule. *See* Govt. Br. at 3. As both courts and commentators have explained, this Court "has recognized that statements which plainly imply that a defendant was guilty of a crime for which he is on trial are considered hearsay if made out-of-court and the declarant is not subject to contemporaneous cross-examination in court." *United States v. Reynolds*, 715 F.2d 99, 103-4 (3d Cir. 1983) (discussing *Krulewitch v. United States*, 336 U.S. 440 (1970)); Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 Minn. L. Rev. 783, 809-810 (1990). As Professor Park points out, in *Krulewitch v. United States*, this Court treated as hearsay the following questions and instructions: "You didn't talk yet?" "Well, don't until we get you a lawyer." "Be very careful what you say." *See* Park, *supra*, at 810; *see also United States v. Palma-Ruedas*, 121 F.3d 841, 857 (3d Cir. 1997) (implied assertions are hearsay), *cert. denied*, 118 S. Ct. 1110 (1998). Moreover, nearly all questions and orders can be recast as declaratory sentences without change of meaning, so that classifying statements as hearsay or nonhearsay based on the grammatical distinction between questions, declaratory sentences and instructions is "highly questionable" and "arbitrary."

(continued...)

The Government also incorrectly suggests that there is no conflict because the Fourth Circuit's opinion in this case was unpublished. In fact, this Court has on numerous occasions granted certiorari to resolve an inter-circuit conflict in cases decided by unpublished decisions, especially where the unpublished decision follows published precedent -- as the Fourth Circuit's decision in this case followed the Sixth Circuit's published opinion in *Marino*. *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 434 (1997) (reversing unpublished 11th Circuit decision); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (reversing unpublished 6th Circuit decision); *Burlington Northern RR Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 460 (1987) (reversing unpublished 10th Circuit decision).[3]

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[2] (...continued)
See Park, *supra*, at 796.

[3] Moreover, as commentators have noted, the large and growing body of unpublished opinions in the Courts of Appeals contains decisions that "are in fact precedential or do have future importance to legal decision makers" and there are "numerous instances of unpublished opinions that in fact did make law." Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Calif. L. Rev. 541, 555(1997); *see also* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 Judicature 307, 313 (1990). To permit such decisions to go unreviewed merely because they are unpublished would create "an underground stream of precedent – unpublished opinions relying on other unpublished opinions." *See* James W. Paulsen & Gregory S. Coleman, *Civil Procedure*, 26 Tex. Tech L. Rev. 397, 440-41 (1995).

II. The Fourth Circuit's Alternate Ruling Admitting the Note as Circumstantial Evidence Is In Conflict With the Tenth Circuit's Decision in *Jefferson*

Contrary to the Government's contention, the Fourth Circuit's alternate basis for admitting the hearsay note, namely as circumstantial or background evidence, is in direct conflict with the Tenth Circuit's decision in *United States v. Jefferson*, 925 F.2d 1242 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991).[4] In *Jefferson*, the Tenth Circuit explicitly rejected the government's argument that evidence which was inadmissible hearsay was nonetheless properly admitted as circumstantial or background evidence.

Jefferson is directly on point with regard to the present case. As in *Jefferson*, the evidence admitted here was admitted not as circumstantial evidence, but was admitted without restriction for the truth of the matter asserted. As in *Jefferson*, the evidence admitted was in fact used by the Government *not* to demonstrate some circumstantial relationship of the parties to the scene, but was presented to the jury as directly supporting Petitioner's guilt. *See infra* at 9. The Fourth Circuit's ruling that the admission of such evidence could be affirmed as circumstantial evidence is directly contrary to the Tenth Circuit's ruling in *Jefferson*. Simply put, under the Tenth Circuit's decision in *Jefferson*, improper hearsay evidence that was admitted and used to prove the truth of the matter asserted at trial may not on appeal be approved as circumstantial evidence. *See Jefferson*, 925 F.2d at 1252-53. The Fourth

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[4] The Government also suggests that the Fourth Circuit did not actually rule that the note, even if inadmissible hearsay, was properly admitted as circumstantial evidence. Petitioner respectfully submits that a fair reading of the Fourth Circuit's opinion indicates that the Fourth Circuit did so rule, and therefore Petitioner addressed this additional basis for granting certiorari.

Circuit's decision to the contrary is not only irreconcilable with *Jefferson*, it is also manifestly incorrect as a matter of law.

III. The Improper Admission of the Note Was Clearly Harmful Error

The Government incorrectly contends that certiorari should not be granted in this case because the error in admitting the note was harmless. *See* Govt. Br. at 10-11 & n.4. This argument ignores both the facts of this case and the applicable standard.[5]

The erroneous admission of the hearsay note in this case violated Mrs. Grady's rights under the Confrontation Clause. Mrs. Grady was unable to cross examine the unidentified author of the note at trial. Moreover, the note possesses no "particularized guarantees of trustworthiness" such as would render examination of its anonymous author of "marginal utility." *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Idaho v. Wright*, 497 U.S. 805, 820 (1990). Therefore, the applicable standard is whether the error was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). Under that standard, the "question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967).

The error in this case clearly contributed to Mrs. Grady's conviction and was harmful under any standard. At trial the Government relied heavily on the evidence of the note. The note was "blown up" and displayed before the jury. In the portion of its closing argument that addressed the case against Mrs. Grady, the Government emphasized the note as direct

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[5] The Fourth Circuit, having affirmed the admission into evidence of the note, did not rule whether the error would have been harmless.

evidence of guilt. The prosecutor stated to the jury during his closing argument in reference to the note: "And, finally, . . . on this letter put on the chart, addressed to 'Lit,' 'So give me five rocks,' you don't ask somebody to give you something unless they have it, ladies and gentlemen." Tr. 10/19/95, at 1-43; *see also id.* at 1-10 to 1-11. Indeed, although the Government now asserts that the note "cannot be said to have affected the outcome of the proceedings" (Govt. Br. at 11), at trial, in arguing for its admission, the Government asserted that the note had "great evidential value." Tr. 10/18/95, at 2-66.

Moreover, the evidence against Mrs. Grady in this conspiracy case was far from substantial. In a conspiracy that allegedly lasted more than a year and comprised 16 transactions, Mrs. Grady was taped on only three occasions. On two of these occasions Mrs. Grady merely handed the telephone to another person. The Government quotes the Fourth Circuit's characterization of these calls as evidence of "direct participation" in the transactions subsequently arranged between the caller and the person to whom Mrs. Grady handed the phone. That characterization is plainly incorrect.[6]

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[6] There is no official transcript of the tapes. The tape of September 14, 1994, records a voice identified at trial as Mrs. Grady's answering the phone, the government informant asking "Can you do 5?" and the voice identified as Ms. Grady's replying, "I didn't hear you" and "Uh-uh," at which point the government informant says to "put Robert on." The caller then negotiates the transaction with Robert. The tape of December 8, 1994, is similar. Mrs. Grady answers the phone and apparently does not hear or does not understand what the government informant wants when he asks if "anything is going on down there" and says he wants "to pick something up." Mrs. Grady merely says "Like what?" and "Huh?" and passes the phone to another person.

Furthermore, the jury was initially undecided as to Mrs. Grady's guilt. The jury came out of its deliberations to request to hear again the tapes brought into evidence against Mrs. Grady and "any evidence pertaining to Mrs. Grady." Tr. 10/20/95, at 12-21. The jury's perception of these tapes and what was said on them was certainly influenced by the erroneously admitted evidence of the note.

In attempting to argue that the error here was harmless, the Government cites out of context the statement by Mrs. Grady's trial counsel that the note did not add much to the evidence against Mrs. Grady. This statement was made by trial counsel in arguing that the unsigned, undated note had little demonstrable relevance to the conspiracy charged, but would be extremely prejudicial and should be excluded under Federal Rule of Evidence 403. Tr. 10/18/95, at 2-63 to 2-65. Thus, far from conceding that the note was harmless, trial counsel's argument was that admission of the note would cause extreme unfair prejudice and harm to Petitioner. *See id.*

In sum, it is substantially probable that the erroneous admission of the unsigned, undated hearsay note into evidence affected the outcome of the trial in this case and was harmful under any standard.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully Submitted,

Douglas W. Dunham
(Counsel of Record)
919 Third Avenue
New York, New York 10022
(212) 735-3000